Supreme Court, U.S.
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No. 09-69

IN THE

Supreme Court of the United States

ROBERT LEWIS NORWOOD,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an *ex parte* affidavit prepared solely for the purpose of establishing a critical fact at a federal criminal trial—namely, that the Government performed a "diligent search" but found no record of defendant's lawful employment, thus providing circumstantial evidence that the defendant was dealing (not merely using) narcotics—is "testimonial" evidence subject to the demands of the Confrontation Clause.

PARTIES TO THE PROCEEDINGS BELOW

The petitioner in this case (defendant-appellant below) is Robert Lewis Norwood. The respondent is the United States of America.

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In The Supreme Court of the United States

ROBERT LEWIS NORWOOD, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

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Robert Lewis Norwood respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion (App. 1a) is reported at 555 F.3d 1061.

JURISDICTION

The court of appeals affirmed Mr. Norwood's conviction and sentence by published opinion filed February 18, 2009. *United States* v. *Norwood*, 555 F.3d 1061 (9th Cir. 2009) (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Upon Petitioner's application dated April 23, 2009, Justice Kennedy extended the time to seek *certiorari* to and including June 18, 2009. Upon Petitioner's further application dated May 29, 2009, Justice Kennedy further extended the time to seek *certiorari* to and including July 18, 2009.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the U.S. Constitution provides, in pertinent part, that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Section 841(a)(1) of Title 21 of the U.S. Code punishes "possess[ion] with intent to manufacture, distribute, or dispense, a controlled substance."

Section 924(c)(1) of Title 18 of the U.S. Code punishes possession of a firearm "during and in relation to any . . . drug trafficking crime."

Section 2106 of Title 28 of the U.S. Code provides that "[t]he Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

STATEMENT OF THE CASE

This case concerns Robert Norwood's constitutional right "to be confronted with the witnesses against him," U.S. Const. amend. VI, at his federal criminal trial. The principle issue at trial was whether narcotics found in Mr. Norwood's home were intended for distribution or mere personal use. Given the presence of a firearm at the scene, the possession-with-intent-to-sell charge carried a mandatory fifteen-year sentence, *see* 18 U.S.C. § 924(c)(1); 21 U.S.C. § 841(b)(1), while mere possession would have resulted in a fraction of that penalty, *see* 21 U.S.C. § 844(a).

The Government's evidence of Mr. Norwood's alleged intent to distribute narcotics was sparse and entirely circumstantial. No witness claimed to have purchased drugs from Mr. Norwood, nor did any witness claim to have observed Mr. Norwood selling drugs to others. Instead, the Government relied on the presence of circumstantial physical evidence—including, *inter alia*, Mr. Norwood's possession of a sizeable amount of cash. Given the lack of any direct evidence that Mr. Norwood was a drug dealer, the district court characterized the Government's case as "closer to the edge rather than heavy duty."

To bolster its case-in-chief, the Government introduced an affidavit in which an employee of the State of Washington claimed to have undertaken "a diligent search of the department's files" yet was unable to find "any record of wages reported" for Mr. Norwood for more than two years preceding his arrest. 555 F.3d at 1064 (App. 4a, 22a). The affidavit in question was created solely for the

purpose of establishing circumstantially a fact necessary for Mr. Norwood's conviction. Specifically, the Government offered the affidavit as proof that Mr. Norwood "had no legal source for the large amounts of cash that were found on his person and in his car," *id.* at 1064 (App. 4a), and therefore that the narcotics seized from Mr. Norwood's home were "knowingly or intentionally . . . possess[ed] with the intent to manufacture, distribute, or dispense," 21 U.S.C. § 841(a)(1), rather than possessed for personal use.

The affidavit at issue consisted of two pages. The first page purported to be a complete copy of Mr. Norwood's employment records from the first quarter of 2004 through the first quarter of 2007. The second page was a formal declaration by the affiant, an employee at the Washington State Employment Security Department, indicating that "a diligent search of the department's files failed to disclose any record of wages" during that span. (App. 22a.) However, according to Mr. Norwood's ex-girlfriend, Mr. Norwood did in fact have legitimate income during the relevant period. She testified at trial that Mr. Norwood worked part-time cleaning rental properties, that he had recently received a lump sum distribution from his prior employer's 401(k) plan, and that he was a successful gambler.

The state employee who executed the affidavit did not appear at trial and was not subject to cross-examination. Mr. Norwood objected to the admissibility of the affidavit as a violation of his Sixth Amendment right to confront witnesses against him. (App. 18a–21a.) The trial judge overruled Mr. Norwood's objection and admitted the

affidavit, stating simply: "I am going to overrule the objection. I will admit it at this time." (App. 20a.) Mr. Norwood was convicted of possession with intent to distribute five grams or more of cocaine base and possessing a firearm in furtherance of a drug trafficking crime. He was sentenced to fifteen years in federal prison.

On appeal, Mr. Norwood renewed his contention that he was deprived of his Sixth Amendment right to confront the Washington State employee who provided evidence against him in the form of an affidavit. The Ninth Circuit affirmed Mr. Norwood's conviction and sentence, holding that the affidavit, though expressly prepared for introduction as evidence at Mr. Norwood's criminal trial, was akin to a "business record" and was therefore nontestimonial and not subject to Sixth Amendment scrutiny. 555 F.3d at 1066 (App. 7a–8a).

After the Ninth Circuit issued its decision, but before Mr. Norwood's time to petition for *certiorari* had expired, this Court decided *Melendez-Diaz* v. *Massachusetts*, 557 U.S. ___ (June 25, 2009). The Court's opinion in *Melendez-Diaz* held that so-called "certificates of no record" (such as the affidavit here), created solely for use as evidence at trial, are "testimonial" and therefore subject to Sixth Amendment scrutiny. This timely petition for *certiorari* followed.

REASONS FOR GRANTING THE PETITION

The decision below cannot stand in light of *Melendez-Diaz* v. *Massachusetts*, 557 U.S. ___ (June 25, 2009). *Melendez-Diaz*—which is squarely on point—was decided after the Ninth Circuit's opinion but before the expiration of Mr. Norwood's time to petition for *certiorari*. Accordingly, this case is an ideal candidate for an order granting *certiorari*, vacating the judgment below and remanding the case for further proceedings in light of *Melendez-Diaz*.

Pursuant to section 2106 of the Judicial Code, this Court has broad power to grant, vacate and remand ("GVR") a case when intervening developments reveal a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence* v. *Charter*, 516 U.S. 163, 167 (1996). By issuing a GVR order, the Court exercises its equitable power to give lower courts the opportunity to reconsider judgments in order to "avoid the unseemliness of holding judgments to be in error" based on information that was previously unavailable. *Id.* at 181 (Scalia, J., dissenting).

Here, in affirming the district court's decision to admit the affidavit from the Washington Employment Security Department employee over Mr. Norwood's timely objection, the Ninth Circuit categorized the affidavit as a so-called "certificate of no record" (CNR), and determined (erroneously) that it was not subject to Confrontation Clause scrutiny because it is akin to a nontestimonial "business record." 555 F.3d at 1066 (App. 7a–8a) (citing *United*

States v. *Cervantes-Flores*, 421 F.3d 825, 831 (9th Cir. 2005)). Four months later, in *Melendez-Diaz*, this Court flatly rejected the application of such reasoning to records—including both traditional affidavits and CNRs—prepared solely for use as evidence at trial:

> "[A] clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it . . . would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched . . . [thereby making the clerk] subject to confrontation." [*Melendez-Diaz*, 557 U.S. ___, slip op. at 10.]

Given the strength of the Court's holding in *Melendez-Diaz* and its direct applicability here, Petitioner respectfully requests that the Court summarily vacate the Ninth Circuit's decision and remand the matter for further proceedings in light of *Melendez-Diaz*.[1] The Court took this very action in five other cases in the days following *Melendez-Diaz*. *See Barba* v. *California*, 557 U.S. ___ (June 29, 2009) (mem.); *Crager* v. *Ohio*, 557 U.S. ___ (June 29, 2009) (mem.); *Morales* v. *Massachusetts*, 557 U.S. ___ (June 29, 2009) (mem.); *Pimentel* v. *Massachusetts*, 557 U.S. ___ (June 29, 2009) (mem.); *Rivera* v. *Massachusetts*, 557 U.S. ___ (June 29, 2009) (mem.).

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[1] Petitioner preserves all arguments raised on appeal to the Ninth Circuit not specifically addressed in this petition.

In the alternative, the Court should either summarily reverse the Ninth Circuit or grant plenary review and set this case for argument. At trial, Mr. Norwood timely asserted his objection regarding the admissibility of the affidavit. He properly preserved that objection on appeal to the Ninth Circuit. The affidavit served as a central piece of evidence against him and led to his conviction. This prejudicial error should not be left uncorrected.

CONCLUSION

For the reasons set forth above, the petition for *certiorari* should be granted, the Ninth Circuit's decision should be vacated and the case should be remanded for further proceedings in light of *Melendez-Diaz*. Alternatively, the Court should either summarily reverse the Ninth Circuit or grant plenary review and set the case for argument.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-30050
D.C. No. CR-06-00091-LRS
February 18, 2009

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

ROBERT LEWIS NORWOOD, Defendant-Appellant

Before:

THOMAS M. REAVLEY*, SENIOR CIRCUIT JUDGE, AND RICHARD C. TALLMAN AND MILAN D. SMITH, JR., CIRCUIT JUDGES.

Opinion by:

JUDGE MILAN D. SMITH, JR.

*The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Appeal from the United States District Court
for the Eastern District of Washington

Lonny R. Suko, District Judge, Presiding

AFFIRMED.

TRACY A. STAAB AND CHRISTINA HUNT, Federal Defenders of Eastern Washington & Idaho, Spokane, Washington, *for the defendant-appellant.*

JAMES A. MCDEVITT AND K. JILL BOLTON, United States Attorney, Spokane, Washington, *for the plaintiff-appellee.*

MILAN D. SMITH, JR., *Circuit Judge*:

Defendant-Appellant Robert L. Norwood appeals his jury conviction of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). On appeal, Norwood claims violation of his Sixth Amendment right to confront his accuser and violation of his due process rights both in trial and at sentencing. Norwood also claims that the evidence was insufficient to convict him for possession of a firearm in furtherance of a drug trafficking crime. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and we affirm Norwood's conviction and sentence.

FACTUAL AND PROCEDURAL BACKGROUND

In April of 2006, police responded to a domestic violence call in Spokane, Washington. Upon entering the home, the police encountered Norwood in the bedroom lying on his bed. They smelled marijuana, and asked Norwood to step outside. In response to police questioning, Norwood admitted he had "just smoked a joint," but denied having any other drugs in the bedroom. The officers then arrested Norwood, and while searching him discovered 0.86 grams of crack cocaine and over $2500 dollars in his pockets.

After obtaining a warrant, the police searched Norwood's home and vehicle. In the car, police found $7000 in cash, separated into $1000 tightly wrapped bundles. In the bedroom, the police discovered two baggies containing a total of 7.7 grams of cocaine base and a digital scale dusted with drug residue underneath the dresser next to the bed. Police also found a wood box containing several "marijuana blunts," or butts of marijuana joints. In the closet, police found 42.4 grams of harvested marijuana in an ice cream box. Between the mattress and the box spring of the bed, police found a 25 caliber semiautomatic handgun. The police did not find any other drug paraphernalia.

On August 2, 2007, Norwood was indicted in federal district court on three counts: (1) being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e); (2) possessing cocaine with the intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 18 U.S.C. § 2; and (3) possessing a firearm in furtherance of a drug

trafficking crime in violation of 18 U.S.C. § 924(c)(1). The government eventually dismissed the first count and proceeded to trial on the second and third counts. Norwood made a Federal Rule of Criminal Procedure 29 motion to dismiss at the close of the government's case, another at the close of the defendant's case, and still a third following trial, each of which was denied.

As part of its case-in-chief, the government presented an affidavit prepared by Jodi Arndt, an employee at the Washington Department of Employment Security, which certified that "a diligent search of the department's files failed to disclose any record of wages reported for [Norwood] from January 1, 2004 through March 31, 2007." Although Arndt did not appear in person to testify, the court admitted her affidavit as circumstantial evidence that Norwood had no legal source for the large amounts of cash that were found on his person and in his car.

During closing argument, Norwood's counsel argued to the jury that the drugs found in Norwood's apartment were for personal use, and suggested that Norwood had been smoking the crack through the marijuana blunts that were found on the scene, but which had not been seized or tested. The prosecutor responded to the defense's comments as follows: "When we talk about those blunts, yeah, it would have been real nice if the police got those. The police didn't get those, but they admitted that, but you know what, the defendant didn't tell them that he was smoking the marijuana with the crack cocaine." The defense immediately objected and moved for a

mistrial on the basis that Norwood's right to silence had been violated. The district court sustained the objection and directed the jury not to consider the prosecution's comment. The court denied the motion for a mistrial.

On October 31, 2007, the jury returned a verdict of guilty on both counts. The district court sentenced Norwood to 120 months in prison for Count 2 and 60 months for Count 3, to run consecutively. Norwood appealed to this court.

STANDARD OF REVIEW

Norwood alleges that his Sixth Amendment right to confront his accusers was violated when the district court admitted into evidence a written affidavit without requiring the affiant to testify on the stand. We review admission of a declarant's out-of-court statements de novo to test for possible violations of the Confrontation Clause. *Lilly v. Virginia*, 527 U.S. 116, 137 (1999).

Norwood also alleges that the prosecution's reference to the fact that he had not spoken with police officers regarding possible use of cocaine in the marijuana blunts violated his due process rights. We review a claim that the prosecution's comment has violated the defendant's right to silence de novo. *United States v. Bushyhead*, 270 F.3d 905, 911 (9th Cir. 2001). If the prosecution's comment is determined to be improper, we then apply harmless error review. *Id.*

Finally, Norwood argues that the evidence was insufficient to convict him on the count of possession of a firearm in furtherance of a drug trafficking crime. When the defendant has moved for a judgment of acquittal after the close of evidence, this court reviews denial of the motion de novo. *United States v. Rios*, 449 F.3d 1009, 1011 (9th Cir. 2006). We will not overrule a conviction if " 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

DISCUSSION

A. Claimed Violation of the Norwood's Sixth Amendment Rights

The Sixth Amendment of the U.S. Constitution guarantees an accused the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Supreme Court has interpreted this right to apply to out-of-court statements as well as in-court testimony. *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004). As the Court in *Crawford* summarized, "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59.

The Supreme Court has yet to define the extent to which rights under the Confrontation Clause are applied to testimonial and nontestimonial

statements. The opinion in *Crawford* traces the history of the Sixth Amendment and identifies "[s]tatements taken by police officers in the course of interrogations" as testimonial. *Id.* at 51-52. However, the *Crawford* Court declined to take up the issue of nontestimonial statements, indicating only that "it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay laws . . . as would an approach that exempted such [nontestimonial] statements from Confrontation Clause scrutiny altogether." *Id.* at 68. The Court then declined the opportunity "to spell out a comprehensive definition of 'testimonial,' " noting only that the term would apply "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.*

This Circuit has interpreted the Supreme Court's ruling in *Crawford* to allow the admission of nontestimonial statements without scrutiny under the Confrontation Clause. *United States v. Cervantes-Flores*, 421 F.3d 825, 831 (9th Cir. 2005). Our opinion in *Cervantes-Flores* also concluded that a certificate of nonexistence of a record (CNR), which contained language virtually identical to the affidavit at issue here, is nontestimonial in nature because it is similar to a business record. *Id.* at 832 (citing *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005) for the same conclusion). As we explained,

> [b]y issuing the CNR, [the affiant] certified that a record that the INS would keep in the course of its regularly conducted

> activities did not exist in the agency's files. She certified this fact in the same manner that she would certify that such a record *did* exist in those files and that it was an official record of the INS.

Id. Although we recognized that the CNR in *Cervantes-Flores* was prepared for litigation, which is "one of the circumstances that *Crawford* emphasizes as a concern of the Sixth Amendment," it addressed a class of documents that were not prepared for litigation, and were better classified as business records. *Id.* at 832-33. The CNR served merely to inform the court that no public record kept in the ordinary course of business could be found.

Cervantes-Flores controls this case. The affiant here prepared a CNR indicating that there was no record that Norwood had received taxable wages for the period in question. Such a record would have been among the business records of the Washington State Employment Security Department kept in the ordinary course of business, if Norwood had been legally employed in Washington during that time. Under the reasoning of *Cervantes-Flores*, the CNR in this case is not testimonial and is admissible under the Sixth Amendment.

Norwood urges this court to reconsider *Cervantes-Flores* in light of the Supreme Court's holding in *Davis v. Washington*, 547 U.S. 813 (2006). Norwood argues that *Davis* stands for the proposition that "a certificate, created by a government employee for the sole purpose of establishing a fact at trial, is clearly testimonial." However, *Davis* involved statements

garnered by police interrogation of domestic violence victims who then failed to appear in court. According to *Davis*:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822. Thus, the *Davis* Court limited its holding to factual situations involving police interrogation, and its holding does not undermine this court's ruling in *Cervantes-Flores*. Accordingly, we affirm the district court's decision to admit Arndt's affidavit.

B. Claimed Violation of Norwood's Due Process Rights at Trial and Sentencing

Norwood charges that his due process rights were violated both at trial and at sentencing. First, he argues that comments made by the prosecution during closing arguments violated his Fifth Amendment right to silence. Second, he argues that the allegedly arbitrary sentencing distinction between crack and powder cocaine violates the Due Process Clause of the Fifth Amendment as well as the Eighth Amendment prohibition against cruel and

unusual punishment. We address these arguments in turn.

The Fifth Amendment protects a defendant's right to remain silent by assuring that "silence will carry no penalty," and that the prosecution cannot use a defendant's silence to imply guilt. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976). As acknowledged by this court, "[t]he privilege against self-incrimination prevents the government's use at trial of evidence of a defendant's silence — not merely the silence itself, but the circumstances of that silence as well." *Bushyhead*, 270 F.3d at 913.

However, where "the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel," there is no Fifth Amendment violation. *United States v. Robinson*, 485 U.S. 25, 32 (1988). In *Robinson*, the defense counsel argued several times in his closing argument that the government had denied Robinson the opportunity to explain his actions. *Id.* at 27. The prosecutor responded by indicating that Robinson could have explained himself by testifying. The Supreme Court ruled that Robinson's Fifth Amendment Rights were not thereby infringed because this response did not "treat the defendant's silence as substantive evidence of guilt," but rather answered the defense's claim that Robinson's trial was unfair. *Id.* at 31-32.

Similarly, in this case, the prosecutor merely responded to Norwood's implication of investigative misconduct. Defense counsel implied that there was no evidence that Norwood had used crack cocaine

only because the police had failed to test the box of marijuana blunts. The prosecutor's comment was made to defend the police officers' decision not to test the marijuana blunts, not to suggest that Norwood's silence was substantive evidence of his guilt.

We will not reverse a lower court's conviction " 'when a prosecutorial comment is a single, isolated incident, does not stress an inference of guilt from silence as the basis for conviction, and is followed by a curative instruction.' " *United States v. Smith*, 282 F.3d 758, 769 (9th Cir. 2002) (quoting *United States v. Tarazon*, 989 F.2d 1045, 1051 (9th Cir. 1993)); *see also United States v. Foster*, 985 F.2d 466, 468 (9th Cir. 1993) (ruling that "there is no *Doyle* violation if the district court promptly sustains a timely objection to a question concerning post-arrest silence, and gives a curative jury instruction"). In this case, the prosecution's allegedly violative comment was a single incident in closing argument, and as indicated above, served primarily to refute an implied claim of investigative carelessness. The district court immediately sustained Norwood's objection to the comment and provided a curative instruction. If any error existed on this record, it was harmless. Based on these facts, we affirm Norwood's conviction.

The Fifth Amendment also guarantees a defendant the right to due process at sentencing. Norwood argues that his sentence, authorized by 21 U.S.C. § 841(b), is cruel and unusual in violation of the Eighth Amendment and based on an arbitrary distinction that violates the Due Process Clause of the Fifth Amendment. *See Chapman v. United*

States, 500 U.S. 453, 465 (1991). Norwood acknowledges that we have previously addressed this issue in *United States v. Harding*, 971 F.2d 410 (9th Cir. 1992). However, he raises the issue in this appeal because "[n]o issue in the world of federal sentencing has sparked more controversy or engendered more criticism than the punishment scheme for crack and powder cocaine." Steven L. Chanenson & Douglas A. Berman, *Federal Cocaine Sentencing in Transition*, 19 FED. SENT. R. 291, 291 (2007).

Under this court's precedent, Norwood must show that there is not even a debatable basis for the distinction between crack and powder cocaine in order to successfully challenge Congress' statutory distinction between these two forms of cocaine base. *Harding*, 971 F.2d at 413 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938)). He has failed to do so.

In his brief, Norwood cites a series of Special Reports to Congress provided by the Sentencing Commission for the past thirteen years. Although these reports indicate that some of the alleged differences between crack and powder cocaine cited by Congress in 1986 have been scientifically disproven, the reports still suggest that the two forms have distinctive qualities and that there are reasons for treating the two forms differently. *See* United States Sentencing Commission, 2007 REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2007).

As Norwood himself seems to acknowledge, in a case such as this it is the role of Congress to alter the relevant statutes, and we remain bound by the statutes currently in effect so long as Congress has a debatable rationale for preserving its rational-basis distinction. Norwood has also failed to provide any persuasive rationale for why his sentence should be considered cruel and unusual under the Eighth Amendment. Accordingly, we affirm Norwood's sentence.

C. Sufficiency of the Evidence

The standard of review for sufficiency of the evidence to support a criminal conviction is well established. The Supreme Court has long advised that a reviewing court is not required to determine

> whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson, 443 U.S. at 319 (internal citation omitted).

To obtain a conviction under § 924(c)(1), the government must show that the defendant's possession of the firearm was "in furtherance" of his drug crime. *United States v. Lopez*, 477 F.3d 1110, 1115 (9th Cir. 2007). As we noted in *Rios*, 449 F.3d at 1013, § 924(c)(1) was amended in 1998 to employ the provision that the firearm be possessed "in

furtherance of" the drug trafficking crime. This amendment superceded the previous standard that the offender "use or carry" a firearm "during and in relation to any . . . drug trafficking crime." 18 U.S.C. § 924(c)(1) (1994), *amended by* 18 U.S.C. § 924(c)(1) (Supp. IV 1998). The amendment sought to broaden the scope of § 924(c)(1) t › include more conduct than actually using or carrying the weapon during the course of the drug trafficking offense. H.R. REP. NO. 105-344, at 6 (1997). *See also Rios*, 449 F.3d at 1013-14 (detailing the reasons behind the alteration, including Congress's disapproval of *Bailey v. United States*, 516 U.S. 137 (1995) (defining "use" to require active employment of a firearm)).

However, "mere possession of a firearm by an individual convicted of a drug crime is not sufficient for a rational trier of fact to convict" under § 924(c)(1). *Rios*, 449 F.3d at 1012. A conviction is only supported by sufficient evidence when the facts "reveal a nexus between the guns discovered and the underlying offense." *United States v. Krouse*, 370 F.3d 965, 968 (2004). To prove this nexus, the government must "illustrate through specific facts, which tie the defendant to the firearm, that the firearm was possessed to advance or promote the criminal activity." *Id.* at 967 (quoting H.R. REP. NO. 105-334, at 12 (1997)). Expert testimony indicating that drug traffickers "generally use firearms to further their drug crimes" is not sufficient. *Rios*, 449 F.3d at 1014.

In cases where the underlying drug offense is possession with intent to distribute, the government has provided adequate evidence of a nexus between

the firearm and the drug crime by showing that the firearm is in the same room and "within easy reach" of a "substantial quantity of drugs and drug trafficking paraphernalia." *Krouse*, 370 F.3d at 968; *see also Lopez*, 477 F.3d at 1115 ("Because Lopez's drug crime was possession of cocaine with intent to distribute, evidence establishing the ready accessibility of the gun while he was in possession of a distributable amount of cocaine satisfied the 'in furtherance' requirement."). In this case, while the quantity of drugs is smaller and the circumstances establishing a nexus are not as clear as those in *Krouse* or *Lopez*, we cannot say that "[no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.

The gun at issue in this case was found by the police only a few feet from evidence that the jury found sufficient to establish Norwood's possession of cocaine with intent to distribute conviction. Specifically, the police found a digital scale, on which drug residue and Norwood's fingerprints were found, and 7.7 grams of cocaine packaged in two "eight ball" sizes, which both parties stipulated is a commercial amount that could be sold on the street. In addition, the police first discovered Norwood lying on top of the mattress where the gun was hidden, with over $2500 dollars in his pocket, along with a smaller amount of cocaine, which witnesses testified could still be considered a commercial amount. Given this evidence, we affirm the district court's ruling that "a reasonable jury could infer that [Norwood] possessed the firearm in furtherance of the trafficking of crack, specifically to protect himself and his business."

Order Den. Mot. For J. of Acquittal, *United States v. Norwood*, No. 06-091, (E.D. Wash. 2007).

AFFIRMED.

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT LEWIS NORWOOD,
Defendant.

Case No. CR 06-091-LRS-1
Date: October 29th–31st, 2007
Spokane, Washington

Transcript of Jury Trial Proceedings

BEFORE THE HONORABLE LONNY R. SUKO

Appearances:

For the Plaintiff: Ms. Katherine Bolton
Assistant US Attorney
PO Box 1494
Spokane, Washington 99210

For the Defendant: Ms. Christina Hunt
Federal Public Defender
North Post
Suite 700
Spokane, Washington 99210

* * *

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Richard Taylor/Direct Examination

* * *

Q. All right. And are you concerned with whether or not an individual is employed as you are looking at the evidence in an investigation?

A. We will look at that as part of what we call unexplained income.

Q. Okay.

MS. BOLTON: And, Your Honor, if I could approach the witness?

THE COURT: You may.

Q. I have handed you what has been marked as government's Exhibit 20 for identification. This is an exhibit you actually

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obtained, is that right?

A. Yes, ma'am, it is.

Q. So are you familiar with that?

A. Yes, I am.

Q. Will you describe for the jury what it is?

A. I requested a -- what we call an employment securities check on the defendant, on Mr. Norwood, reference any reported income within the State of Washington.

Q. And how do you make that kind of a request for information?

A. Well, it is done through a subpoena, but fortunately for my office, we have an individual there that I just ask her to do that for me.

Q. Okay. And this is, what is government's Exhibit 20, is something you received back from the Department of Employment Security?

A. Correct. It shows the Social Security number. Employment is reported by Social Security number.

Q. Okay. And is that a certified copy? There is two pages there to that document, is there a certification that authenticates that as the document on file with the Department of Employment Security?

A. Yes, there is.

MS. BOLTON: Your Honor, the government moves to admit Exhibit 20.

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Ms. Hunt: Your Honor, I would object in that it is not only hearsay, but there is a proffered issue with it. So there is a Sixth Amendment confrontation problem.

THE COURT: The inability to cross-examine the information therein.

MS. BOLTON: Your Honor, it is a certified document. I have set forth actually in the exhibit list I have provided to the court, the Rules of Evidence under which it is admissible.

It is a self authenticating document pursuant to Federal Rule of Evidence 902[(4)], and is admissible pursuant to Federal Rule of Evidence 803[(10)] in the event of some hearsay objection.

MS. HUNT: Well, neither of those reach the proffered objection, Your Honor.

THE COURT: Thank you. Give me just a moment. I am going to overrule the objection. I will admit it at this time.

(Exhibit 20 received)

Q. I am going to see here if I can pull it up. That is government Exhibit 20, is that right?

A. Yes, ma'am.

Q. I can't pull it up --

MS. BOLTON: Excuse me, if I could approach the witness, Your Honor?

THE COURT: You may.

Q. And can you see that there in front of the screen – on

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the screen in front of you?

A. Yes, ma'am, I can.

Q. And that is government's Exhibit 20, right?

A. It is the top half, yes, and the first of two pages.

Q. All right. Let's see if we can zoom out. The bottom half there just has the exhibit number?

A. Correct, on this page and then the back page has the certification.

Q. That second page there is just the certification by Jody Arndt who is with the Department of Employment Security?

A. Yes, ma'am.

Q. And will you read for us into the record what that document says, government's Exhibit 20?

MS. HUNT: Well, Your Honor, the document speaks for itself.

THE COURT: I think it does.

* * *

[LOGO]
Employment Security Department
WASHINGTON STATE
PO Box 9046 Olympia, WA 98507-9046

CERTIFICATION

RE: ROBERT NORWOOD
SSN: 538-56-8614

I, Jody Arndt, Assistant Records Officer, of the Employment Security Department, of the State of Washington and custodian of the department records, do hereby certify that a diligent search of the department's files failed to disclose any record of wages reported for the above named individual from January 1, 2004 through March 31, 2007.

Dated on August 8, 2007.

/s/ Jody Arndt
Jody Arndt

STATE OF WASHINGTON
COUNTY OF THURSTON

On August 8, 2007, personally appeared before me, Jody Arndt, to me known to be the Assistant Records Officer for the Employment Security Department.

/s/ Shalina Rae Combes
Notary Public in and for the
State of Washington
Residing at County of Thurston
My Commission Expires 2010
[NOTARY PUBLIC SEAL]

Supreme Court, U.S.
FILED
SEP 1 2 2009
OFFICE OF THE CLERK

No. 09-69

In the Supreme Court of the United States

ROBERT LEWIS NORWOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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Solicitor General
Counsel of Record
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QUESTION PRESENTED

Whether petitioner's rights under the Confrontation Clause of the Sixth Amendment were violated by the admission of a certificate of no records at his trial to establish that petitioner had no reported income, when the state employment officer who provided the certification did not testify.

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In the Supreme Court of the United States

No. 09-69

ROBERT LEWIS NORWOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 555 F.3d 1061.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2009. On April 24, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including June 18, 2009. On June 2, 2009, Justice Kennedy further extended the time to July 18, 2009, and the petition was filed on July 17, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Washington, petitioner

was convicted of possession of more than five grams of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B), and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). He was sentenced to 180 months of imprisonment, to be followed by eight years of supervised release. The court of appeals affirmed. Pet. App. 1a-16a.

1. On April 30, 2006, Spokane police officers came to petitioner's home in response to a 911 call. Petitioner's girlfriend informed the officers that petitioner had struck her in the chest and threatened to shoot her and her sons. When petitioner admitted that he had smoked marijuana, he was arrested. A search of his pockets incident to the arrest turned up 0.86 grams of cocaine base and $2531 in cash. The officers then obtained and executed a search warrant for petitioner's home and vehicle, discovering $7000 in cash in seven tightly wrapped bundles, 7.7 grams of cocaine base on a metal plate bearing petitioner's fingerprint, a digital scale dusted with drug residue, 42.4 grams of marijuana, and a loaded semiautomatic handgun. Pet. App. 3a; Gov't C.A. Br. 8-11.

2. In June 2007, a grand jury in the Eastern District of Washington returned a second superseding indictment charging petitioner with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 924(e); one count of possession of five grams or more of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B); and one count of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). Second Superseding Indictment 1-3.

a. The felon-in-possession charge was severed and tried first. Dkt. 54. The jury was unable to reach a verdict and the court declared a mistrial. Dkt. 94, 98, 108. The district court later granted the government's motion to dismiss that count without prejudice. Dkt. 144, 145. That count is not at issue here.

b. Petitioner was then tried before a jury on the remaining two counts. To show that petitioner's large sums of cash reflected drug proceeds and not employment income, Drug Enforcement Agency Task Force Agent Richard Taylor testified at trial that he had asked a woman at the Washington Department of Employment Security to search its files to determine if petitioner had reported receiving any income in Washington between 2004 and 2007. Pet. App. 18a-19a, 22a. The government offered into evidence the two-page results of that search. The first page was a standardized computer printout containing eight fields designated to report employer and employee identification and wage information. A note near the top of the report stated "No wages reported for the individual when SSN only appears." Gov't Exh. 20, at 1. With the exception of petitioner's Social Security number, all of the fields on the form were blank. The second page of the exhibit was dated August 8, 2007, and consisted of a notarized certification from Jodi Arndt, a Department of Employment Security Assistant Records Officer, declaring that "a diligent search of the department's files failed to disclose any record of wages reported for [petitioner] from January 1, 2004 through March 31, 2007." Pet. App. 4a, 22a. Arndt did not testify at the trial.

Petitioner objected to admission of the exhibit on the ground that it was "not only hearsay" but also presented a "Sixth Amendment confrontation problem." Pet. App.

19a. The government responded that the document was a self-authenticating certification of the nonexistence of a record and thus admissible under Federal Rules of Evidence 902(4) and 803(10). Pet. App. 20a. The district court overruled the objection and admitted the exhibit. *Ibid.*

Petitioner's girlfriend testified at trial that he had no bank account and never received paychecks, although he occasionally worked part-time cleaning rental properties. He also had recently cashed a sizeable retirement check and was a successful gambler. C.A. E.R. 386-394.

The jury found petitioner guilty on both counts, and the district court sentenced him to 180 months of imprisonment. Pet. App. 5a.

3. The court of appeals affirmed. Pet. App. 1a-16a. As relevant here, it concluded that the admission of Arndt's affidavit into evidence did not violate the Confrontation Clause. *Id.* at 6a-9a. The court noted that under *Crawford* v. *Washington*, 541 U.S. 36 (2004), the Confrontation Clause forbids only the admission of testimonial statements. Relying on circuit precedent, the court of appeals determined that a certificate of the nonexistence of a record "is nontestimonial in nature because it is similar to a business record." Pet. App. 7a (citing *United States* v. *Cervantes-Flores*, 421 F.3d 825, 832 (9th Cir. 2005) (per curiam), cert. denied, 547 U.S. 1114 (2006)).

Petitioner asserted Arndt's affidavit was in fact testimonial because it "was prepared for litigation," but the court rejected that claim based on its view that the affidavit "addressed a class of documents that were not prepared for litigation, and were better classified as business records." Pet. App. 8a. Because any record that petitioner *had* received taxable wages between 2004 and

2007 would have been a record kept in the ordinary course of the Washington Employment Security Department's business, and thus would have been nontestimonial, the court of appeals concluded that the record here, establishing that petitioner *had not* received taxable wages, was equally nontestimonial. *Ibid.*

DISCUSSION

Petitioner contends (Pet. 6-9) that his case should be remanded to the court of appeals for further consideration of his Confrontation Clause challenge in light of *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527 (2009). The government agrees.

1. In *Melendez-Diaz*, this Court held that admission of a state chemist's certificates of analysis that attested that material seized by the police and linked to the defendant contained cocaine violated the Confrontation Clause when the chemist did not testify at trial. Relying on *Crawford* v. *Washington*, 541 U.S. 36 (2004), the Court explained that such certificates constituted testimonial affidavits that fell within the Confrontation Clause. *Melendez-Diaz*, 129 S. Ct. at 2532.

One of the Commonwealth's arguments in defending the conviction in *Melendez-Diaz* had been that the records in question were official or business records, which the Court had suggested in *Crawford* were not testimonial. See *Crawford*, 541 U.S. at 56. This Court rejected that argument, concluding that the certificates of analysis "do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless." *Melendez-Diaz*, 129 S. Ct. at 2538.

As to whether the records in question qualified as business or official records: the Court stated that the

business and official records exception at common law related only to "records prepared for the administration of an entity's affairs, and not for use in litigation." *Melendez-Diaz*, 129 S. Ct. 2538 n.7. This Court noted a common law exception to the rule: "A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record." *Id.* at 2539. "[B]ut," the Court observed, the clerk "could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant." *Ibid.* Instead, the Court noted, common law cases had required confrontation when "the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it." *Ibid.*

As to the relationship between the business or official records exception and the Confrontation Clause: the Court drew a distinction between official records "created for the administration of an entity's affairs," and official records created "for the purpose of establishing or proving some fact at trial." *Melendez-Diaz*, 129 S. Ct 2539-2540. Under *Crawford*, the Court concluded, "[w]hether or not [records] qualify as business or official records," documents "prepared specifically for use at [a defendant's] trial * * * [are] subject to confrontation under the Sixth Amendment." *Id.* at 2540.

Under *Melendez-Diaz*'s analysis, the district court erred in admitting Arndt's affidavit without requiring that she be called as a witness. Agent Taylor's testimony established that Arndt's affidavit was prepared specifically for use at petitioner's trial, and her report of searching for but failing to find any record of petitioner earning wages in Washington would not fall within the

narrow common law rule permitting only authentication certificates absent a live witness.

2. Where testimonial hearsay is erroneously admitted over objection, a conviction may still stand if the error was harmless. *Melendez-Diaz*, 129 S. Ct. at 2542 n.14. An error is harmless if the government can show beyond a reasonable doubt that the error complained of did not contribute to the conviction. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). Here, the only fact established by Arndt's affidavit was that the cash in petitioner's possession did not come from reported income, which supported the inference that it came from drug dealing proceeds. Independently of the large sums of cash, petitioner's distribution paraphernalia strongly suggested he was engaged in drug distribution. The plate with cocaine base and the digital scale were found stacked one on top of the other, Gov't Exh. 7, and the plate bore petitioner's fingerprint, C.A. E.R. 290, 295-296. The obvious inference, wholly apart from the cash, was that petitioner used the equipment to engage in measuring cocaine base for distribution. While the admission of the affidavit thus appears harmless beyond a reasonable doubt, the court of appeals is in the best position to resolve that issue. The appropriate course would be to grant the petition for a writ of certiorari, vacate the court of appeals' judgment, and remand for further consideration in light of *Melendez-Diaz*.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527.

Respectfully submitted.

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SEPTEMBER 2009